

**DANN M. WESSNER**  
Claimant

**LOWE'S**

**AMERICAN HOME ASSURANCE COMPANY**  
Insurance Carrier

Docket No. 1,017,279

Having reviewed the evidentiary record compiled to date, the Board makes the following findings of fact and conclusions of law:

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an ALJ exceeded his or her jurisdiction.<sup>1</sup> This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.<sup>2</sup>

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>3</sup>

Respondent argues that claimant was working a second job at the time of his accident and that he continues to work that other job. However, evidence of this allegation was not presented to the SALJ at the preliminary hearing.

K.S.A. 44-555c(a) provides that "[t]he review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge." The "facts" raised by respondent in its brief for consideration by the Board on appeal were not presented to nor considered by the SALJ. Accordingly, this evidence cannot be considered by the Board.

The SALJ has the jurisdiction and authority to grant or deny temporary total disability benefits at a preliminary hearing. Therefore, the SALJ did not exceed his jurisdiction. Whether claimant is working another job and whether this would prevent claimant from receiving temporary total disability benefits are not issues that are reviewable from a preliminary hearing order.

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<sup>1</sup> K.S.A. 44-551.

<sup>2</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>3</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303 and 304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

Accordingly, the Board concludes that it does not have jurisdiction at this juncture of the proceedings to review whether the SALJ erred in granting claimant temporary total disability compensation.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon full hearing on the claim.<sup>4</sup> Furthermore, there is no limit to the number of preliminary hearings that may be held in a case. Respondent is free to seek another hearing and present such additional evidence as it deems relevant.

**WHEREFORE**, respondent's appeal of the July 14, 2004 Order entered by Special Administrative Law Judge Vincent L. Bogart is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2004.

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant  
P. Kelly Donley, Attorney for Respondent and American Home Assurance Co.  
Vincent L. Bogart, Special Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>4</sup> K.S.A. 44-534a(a)(2).